Supreme Court, U.S.
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No. 05-15614

IN THE

Supreme Court of the United States

DONALD K. KLEPPER, PETITIONER

v.

The CITY OF PAGE, an Arizona municipal corporation; et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONALD K. KLEPPER
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Pro Se Petitioner

QUESTIONS PRESENTED

Plaintiff Donald K. Klepper, *pro se*, petitions for a Writ of Certiorari because the Ninth Circuit has entered a decision in conflict with the decision(s) of other United States Court of Appeals and the United States Supreme Court on the same important matter(s).

I. Did the United States Court of Appeals for the Ninth Circuit enter a conflicting decision when it did not recognize genuine issues of material fact and affirmed the lower court's judgment in favor of the defendants?

II. Did the United States Court of Appeals for the Ninth Circuit enter a conflicting decision when it denied the Plaintiff's due process claim based on liberty interest under 42 U.S.C. § 1983 by asserting that he was offered a name-clearing hearing when the record shows that no offer was made when he was terminated even though the Plaintiff submitted a written request for any administrative appeal or hearing process?

III. Did the United States Court of Appeals for the Ninth Circuit enter a conflicting decision when it ruled that the Plaintiff's First Amendment retaliation claim under 42 U.S.C. § 1983 was foreclosed by the nature of his position in city government?

PARTIES TO THE PROCEEDING

The CITY OF PAGE, Arizona, an Arizona municipal corporation; J. Dean Slavens and Judy Slavens, husband and wife; Wes Berry and Erminia Berry, husband and wife; Dan Brown and Janet Brown husband and wife; John Kocjan; William R. Robinson and Alice Robinson, husband and wife.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Donald K. Klepper, pro se,* v. *City of Page, Arizona, an Arizona municipal corporation; et. al.,* (9th Cir., 2006). It is reproduced in the Appendix at App. 1a. The opinion of the District Court granting respondent's motion for summary judgment is unreported and is reproduced in the Appendix at App. 5a.

JURISDICTION

This case is properly before the Supreme Court. The District Court of Arizona entered judgment or orders on September 24, 2004 and March 24, 2005. A Memorandum before Leavy, Gould, and Clifton, Circuit Judges, from the United States Court of Appeals for the Ninth Circuit was filed on November 14, 2006. A Petition for Panel Rehearing was denied on December 27, 2006. The judgment was rendered by the United States Court of Appeals for the Ninth Circuit on January 4, 2007.

RELEVANT PROVISIONS INVOLVED

42 U.S.C. § 1983 violation of due process based on deprivation of property rights, liberty interest, free speech, privacy rights and unlawful retaliation.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

(c) ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ...

STATEMENT

On December 11, 2000, Plaintiff was hired by the City of Page, Arizona, as its City Manager. Employment was secured by an employment contract in which Plaintiff was referred to as **employee** and City of Page as **employer**. Plaintiff suffered retaliation and, ultimately, termination of employment after reporting the unlawful activities of the Mayor and City Council of Page to them and insisting they follow the law. Plaintiff also suffered damage to his personal and professional reputation.

Question I: The material facts in this case are absolutely in dispute by conflicting evidence in depositions, affidavits and written exhibits in the record. Under well-established standards, the Ninth Circuit erred in affirming summary judgment. Plaintiff deserves the chance to present his case to a jury. The Ninth Circuit's decision is in conflict with *United States ex rel. Glass*, 957 F. 2d 605, 607; *Arnett*, 416 U.S. 134; *Codd*, 429 U.S. 624, 627-28; and Hunt, 526 U.S. 541, 119 S.Ct. 1545.

Question II: The Ninth Circuit's decision is in conflict with *Buxton*, 871 F.2d 1037 in which the Eleventh Circuit set forth six elements of a violation of a governmental employee's liberty interest. The occurrences at the May 7, 2002, City Council Meeting at which the Plaintiff was terminated **do** meet the conditions of *Buxton*, but the Plaintiff was **not** offered a name-clearing hearing. Plaintiff on May 10, 2002, asserted any and all administrative rights to appeal his termination from his position as

City Manager and asked to be notified of any administrative appeal or hearing process to contest his termination. Plaintiff received no response from the Defendants.

Question II: The Ninth Circuit's finding that Plaintiff was offered a name-clearing hearing is factually flawed. The only name-clearing hearing that Plaintiff was offered came as a result of a December 19, 2001, meeting which did not meet the *Buxton* criteria. The proffered name-clearing could not be a **meaningful meeting** [emphasis added] *Buxton, 871 F.2d at 1037 element (6)* because five of eight statements entered into the record were from unnamed sources. Plaintiff was constructively barred from an opportunity to cross-examine those sources who had furnished statements that were entered into the record by an elected official who sought protection under his First Amendment rights as a reporter. This resulted in a motion to terminate Plaintiff which failed. The criteria listed in *Buxton, supra, specifically element (3)* was not met. The requisite stigma from these unnamed sources tainted the remainder of Plaintiff's employment. *See Shands*, 993 F.2d 1337, 1347, and *Winegar*, 20 F.3d 895-899.

Question III: Plaintiff's Count IV Complaint, "Due Process Violation, Deprivation of Property Rights, Liberty Interests, Free Speech, Privacy Rights, and unlawful Retaliation Under 42 U.S.C. § 1983, is rooted in the centuries old principle that the state may not deprive a person of the freedom "to engage in any of the common occupations of life" without due process. *See Board of Regents*, 408 U.S. 564, 576-577, 92 S.Ct. 2701, 2708-2709; and *Bigby*, 766 F.2d 1053, 1057. The Ninth Circuit's decision is at odds with the case law that follows the statement

in *Roth* that a party who had no property interest and no right to continued employment may nonetheless be entitled under the Fourteenth Amendment to a hearing if a decision not to rehire him was accompanied by "any charge against him that might seriously damage his standing and associations in his community" or "impose upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *See Board of Regents*, *supra*, 408 U.S. at 576-577; and *Shands*, 993 F.2d 1337, 1347.

Question III: In recognition that "[g]overnment employees are often in the best position to know what ails the agencies for which they work," the First Amendment prohibits government retaliation against employee speech that touches matters of public concern. (*See Waters*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887; and *Connick*, 461 U.S. 138, 146, 103 S.Ct. 1684). The violations cited and alleged throughout Plaintiff's Complaint evidence a repeated pattern and practice of retaliation against Plaintiff for bringing to the Council's attention with the concurrence of the Council's own counsel - in a Council ordered review of the Page Electric Utility - illegal activity and operations to include a written notice that the Mayor would terminate Plaintiff if he could find the votes. The Ninth Circuit's decision is in conflict with both *Waters* and *Connick*.

Question III: In order to meet the criteria of the First Amendment retaliation claim, Plaintiff has only to demonstrate that he suffered a loss of any governmental benefit or privilege in retaliation for the protected speech activity, **not that he had a legal right to the benefit denied to him** [emphasis added]. The denial of even a "trivial" benefit may

form the basis for a First Amendment claim where the aim is to punish protected speech. *See Rutan*, 497 U.S. 62, 75-76, 110 S.Ct. 2729, 2737-38; and *Elrod*, 427 U.S. 347, 359, 96 S.Ct. 2673, 2683 fn.13 (explaining that First Amendment rights are violated "both where the government fines a person a penny . . . and where it withholds the grant of a penny" to punish or suppress protected speech). The Ninth Circuit's decision in the instant case is in conflict with both *Rutan* and *Elrod*.

Question III: The decisions made by the Defendants were in retaliation for protected speech activity, and the First Amendment was violated. *See Mt. Healthy City Sch. Dist. Bd. of Ed.*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574. The Ninth Circuit's decision contradicts *Mt. Healthy*.

Question III: The Ninth Circuit's decision does not recognize that Plaintiff's Employment Agreement does not and cannot deny Plaintiff his civil rights and the rights of due process, as well as the rights to equal protection afforded to all citizens of the United States under the Constitution. Plaintiff's 42 U.S.C. § 1983 claims are based on the constitutional admonishment that the government "may not deny a benefit to a person on a basis that infringes on his constitutionally protected interests." *See Perry*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697.

CONCLUSION

With all due respect to the Appellate Court the two and a half page memorandum, that fails to address the issues in the complaint where there are glaring issues of material fact, seems to send a message that Pro Se litigants are citizens of lesser protection. The last time a citizen's constitutional rights were so defined occurred when sharecroppers' agreements were administered by the Freedmen's Bureau following the Civil War.

Respectfully submitted

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No. 05-15614
D.C. No. CV-03-00847-MHM
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD K. KLEPPER,
Plaintiff-Appellant,

v.

CITY OF PAGE, an Arizona
municipal corporation; et al.,
Defendants-Appellees.

November 6, 2006, Submitted**
November 14, 2006, Filed

COUNSEL: For DONALD K. KLEPPER, Plaintiff-Appellant, pro so, Missoula, MT.

For CITY OF PAGE, an Arizona municipal corporation; et al., Defendants-Appellees: Stephen D. Hoffman, Esq., Lewis, Brisbois, Bisgaard & Smith, Phoenix, AZ.

Before: HON. LEAVY, GOULD, and CLIFTON, Circuit Judges.

Appeal from the United States District Court for the District of Arizona. Mary H. Murguia, District Judge, Presiding

OPINION: MEMORANDUM*

Donald K. Klepper appeals pro se from the district court's summary judgment in favor of defendants in Klepper's action alleging, *inter alia*, breach of contract and due process violations arising

from his termination as City Manager of Page, Arizona. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Hobler v. Brueher*, 325 F.3d 1145, 1151 (9th Cir. 2003), we affirm.

The district court properly granted summary judgment on Klepper's breach-of-contract claim because his employment was subject to termination under both the "successor board" doctrine, *see Serna v. Pima County*, 916 P.2d 1096, 1097 (Ariz. App. 1995), and the plain language of his employment agreement, which also incorporated by reference Arizona law specifying his employment was at-will, *see* Ariz. Rev. Stat. 9-303(C) ("The person appointed to the office of city or town manager shall serve at the pleasure of the governing body of the city or town and may be removed without cause by a majority vote thereof.").

The district court properly concluded that Arizona law did not recognize a separate tort action for breach of the implied covenant of good faith and fair dealing in the employment context. *See Nelson v. Phoenix Resort Corp.*, 888 P.2d 1375, 1385 (Ariz. App. 1994). The district court also properly concluded that Klepper could not bring a tortious interference claim against defendants because they were not third parties to the employment agreement. *See Payne v. Pennzoil Corp.*, 672 P.2d 1322, 1327 (Ariz. App. 1983).

The district court properly granted summary judgment on Klepper's due process claims. Because Klepper served at the pleasure of the City Council, he had no property right in his continued employment. *See Brady v. Gebbie*, 859 F.2d 1543, 1548 (9th Cir. 1988). To the extent Klepper's due process claim was based on his liberty interest in his reputation,

the claim fails because it is undisputed that he was offered a name-clearing hearing. *See Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972). The district court also properly concluded that Klepper's First Amendment retaliation claim was foreclosed by the nature of his position in the city government. *See Hobler*, 325 F.3d at 1151-52 ("policymaker" exception applies to "certain key personnel who aren't policymakers . . . but who are critical to effective policy implementation, and whose loyalty and confidentiality are necessary").

Klepper's remaining contentions lack merit.

We deny all pending motions as moot.

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

No. 05-15614
DC # CV-03-00847-MHM
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD K. KLEPPER,
Plaintiff-Appellant,

v.

CITY OF PAGE, an Arizona
municipal corporation; et al.,
Defendants-Appellees.

December 27, 2006, Filed

Before: HON. LEAVY, GOULD, and CLIFTON, Circuit Judges.

OPINION: ORDER

The petition for panel rehearing is denied.

No. CIV 03 0847-PCT-MHM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DONALD K. KLEPPER,
Plaintiff,

v.

The CITY OF PAGE, an Arizona municipal corporation, et al.,
Defendants.

September 24, 2004
September 29, 2004 Filed

Before: HON. MARY H. MURGUIA, United States District Judge.

OPINION: ORDER

Plaintiff pro se has filed this action asserting multiple claims against the Defendants for termination of his contract as City Manager for the City of Page, Arizona. Defendants have moved for partial summary judgment as to Plaintiff's claims for breach of contract (Count I); breach of the implied covenant of good faith and fair dealing (Count II); violation of due process based on deprivation of property rights, liberty interest, free speech, privacy rights and unlawful retaliation under 42 U.S.C. § 1983 (Count IV); tortious interference with contractual relations (Count V); and violation of Arizona's Open Meeting Law (Count VI) . . (Doc. 13). Defendants are the City of Page, J. Dean Salvens, the Mayor of the City of Page, and City Councilors of the City of Page Wes Berry, Dan Brown, John Kocjan,

and William R. Robinson.[1] Plaintiff has filed a response on summary judgment (Doc. 33) and Defendants have filed a reply. (Doc. 37). Defendants also have filed a motion to strike matters set forth in Plaintiff's Statement of Facts (Doc. 20) and Plaintiff has filed a reply to this motion. (Doc. 23).

The Court heard oral argument on Defendants' pending motions on May 25, 2004. The Court enters the following Order on Defendants' motion for partial summary judgment and motion to strike. This Court's jurisdiction is based on federal question, 28 U.S.C. § 1331, and diversity of citizenship. 28 U.S.C. § 1332.

I.

Standard of Review.

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either part." Anderson v. Liberty Lobby, Inc., 477 U.S.242,250,106S.Ct. 2505, 2511 (1986). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). See also, Matsushita Elec. Indus. Co. v.

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[1] The wives of the individual defendants also have been named as defendants.

Zenith Radio Corp., 475 U.S. 574,586-87,106 S.Ct. 1348, 1356 (1986).

II.

Defendants' Motion to Strike Plaintiff's Statement of Facts and Expunge the Record.

Defendants have filed a motion to strike the matters set forth at paragraphs 51, 62, 63 and 68 of Plaintiff's Statement of Facts and to expunge Plaintiff's Exhibits AN, AT, AU and AY from the record. Defendants contend that these statements and accompanying exhibits are privileged communications between the City of Page and its retained counsel and are protected by the attorney-client privilege. The Court has examined these challenged items and finds that they are protected by the attorney-client privilege. Defendant's motion to strike (Doc. 20) is granted. These items have not been considered by the Court on summary judgment. The Clerk shall be directed to strike the factual paragraphs and to remove the exhibits from the record. The Court will reconsider this ruling upon a proper showing that the attorney-client privilege as to these matters has been waived or does not apply.

III.

Background Facts.

By agreement styled "Employment Agreement" ("Agreement") dated December 11, 2000, Plaintiff agreed to serve as the City Manager for the City of Page, Arizona. Plaintiff's duties as City Manager were as specified in the City of Page City Code. Regarding these duties, the Agreement provided as follows:

> Employer herein agrees to retain said Don K. Klepper as City Manager of the City of Page, Arizona to perform the functions and duties specified in the City Code, and to perform other legally permissible and proper duties and functions as the City Council shall from time to time assign.

(Defendants' Statement of Facts (DSOF) at Exhibit 1, section 1).

The Agreement further provided that the City, through the City Council, reserved the right to terminate the services of Plaintiff at anytime, subject to the severance pay provision of the Agreement. Upon termination of Plaintiff's services for reasons other than for cause, including misconduct, etc., Plaintiff was entitled to receive a lump sum cash payment equal to two months base salary as severance pay. The relevant provisions of the Agreement on these issues are as follows:

> Nothing in this agreement shall prevent, limit or otherwise interfere with the right of the City Council to terminate the services of Employee at any time, subject only to the provisions set forth in Section 3 of this agreement.
>
> ****
>
> The City Manager shall serve at the pleasure of the governing body of the city or town and may be removed without cause by a majority vote thereof in accordance with A.R.S. § 9-303(C). In the event Employee is terminated by the City Council during

> such time that Employee is willing and able to perform his duties under this agreement, then in that event, Employer agrees to pay Employee a lump sum cash payment equal to 2 months of base salary as severance pay; provided, however, that in the event Employee is terminated because of his failure to perform his job duties, misconduct under the provisions of the City of Page Personnel Rules, conviction of any illegal act involving personal gain to him or his conviction of the use or abuse of alcohol or any illegal drug while on duty, or a violation of the City of Page EMPLOYEE DRUG FREE WORKPLACE POLICY, Employer shall have no obligation to pay the aggregate severance sum designated in this paragraph.

(DSOF, at Exhibit 1, sections 2 (A) & 3 (A)).

The Agreement expressly provided that its terms constituted the entire agreement between the parties:

> The text herein shall constitute the entire agreement between the parties and no other provisions of any laws, ordinances, rules or regulations pertaining to the employees of the City of Page shall apply to the employee named herein unless the same are specifically incorporated herein by reference.

(DSOF, at Exhibit 1, section 17 (A)). The City's Agreement with Plaintiff was to become effective between January 2, 2001 and February 1, 2001. (DSOF, at Exhibit 1, section 17 (C)).

Pursuant to Page City Code Section 3-2-1(A), the City Manager is appointed by the City Council "wholly on the basis of his administrative and executive ability and qualifications and shall hold office for and at the pleasure of the Council." The City Manager's compensation is fixed by the Council. Section 3-2-1(C). The City Manager "may be removed by a majority vote of the entire Council, but shall continue his salary for sixty days following the removal date." Section 3-2-1(D).

The duties of the City Manager are set forth in the Page City Code at § 3-2-1(E). The City Manager serves as the administrative head of the City government. He is authorized to appoint and suspend or remove all officers and employees of the City not appointed by the City Council. The City Manager's fiscal responsibilities include preparing and submitting the annual budget to the City Council, presenting the City's end-of-the year fiscal report to the Council, and advising the City Council or the City's present and future financial needs and making such recommendations as appropriate. The City Manager recommends to the City Council the pay schedule for each appointed office and position of the City and other measures as may be appropriate for the City's administrative services. The City Manager attends all Council meetings unless excused from such meetings and takes part in the discussion of matters at issue before the Council. The City Manager also is responsible for acquiring materials, supplies and equipment for the City's needs and, in case of an emergency, may award

contracts and make purchases subject to Council approval. The City Manager also may investigate the affairs of the City or any of its departments or divisions.

At the time Plaintiff entered into the Employment Agreement, the Page City Council consisted of the following members: Mayor Robert Bowling; and Council members Tina Holman, Cheryl Schwarts, Tim McDaniels, Mel McQuarrie, John Kocjan and Brad Henningsen. On January 4, 2001, Mayor Bowling and Acting City Manager Wayne Wright received recommendations from an accounting firm regarding the financial assets and operation of the Page Electric Utility ("PEU"), a city-owned utility. (PSOF at para. 12). At the January 25, 2001 City Council meeting, Plaintiff was directed to review, analyze and consider the proposed comprehensive plan concerning the PEU and follow up with a report and recommendation. (PSOF at para. 14). In a March 12, 2001 memorandum to Mayor Bowling, Plaintiff responded by expressing certain opinions on issues relevant to the PEU. (PSOF at para. 15).

On March 13, 2001, Defendant Slavens was elected Mayor for the City of Page. Defendants Berry, Brown and Robinson were elected to the vacant seats on the City Council. (DSOF, at Exhibit 3, para. 3). The City Council seated on May 31, 2001 was comprised of the following members: Mayor J. Dean Slavens and Councilors Wes Berry, Dan Brown, William R. Robinson, Mel McQuarrie, John Kocjan and Brad Henningsen. (DSOF, at Exhibit 3, paras. 4-5).

On March 16, 2001, Plaintiff completed the PEU review and submitted his recommendations.

(PSOF at para. 17). The issue of the PEU and related matters became sources of dissension between Plaintiff and the new Mayor and Council during 2001 and 2002. (PSOF at paras. 20-21, 26-27, 38-39, 52, 67, 76). In a July 18, 2001 memorandum addressed to Plaintiff concerning Plaintiff's recommendations on the PEU, Mayor Slavens wrote "You are not a policy maker but an implementer of the policy established by the elected City Council". (PSOF at para. 27). Copies of the memorandum were provided to the City Council members. (id.). On July 18, 2001, Plaintiff responded to Mayor Slavens' memorandum by stating that he had never dictated policy but had only recommended action to the City Council. (PSOF at para. 28).

Other issues of disagreement developed between Plaintiff and Mayor Slavens and certain members of the City Council during this same time period. For example, in July 2001 Mayor Slavens allegedly requested that the Sheriff of Coconino County perform a criminal background investigation on Plaintiff. (PSOF at para. 29). Plaintiff allegedly learned in or about August 2001 that Mayor Slavens and Council Member Brown had contacted a County Commissioner in Ravalli County, Hamilton, Montana, to inquire about Plaintiff. Plaintiff previously had served as the Chief Administrative Officer in Ravalli County. (PDOF at para. 33).

In or about September 2001, Mayor Slavens requested that a Special Meeting of the City Council be convened in October 2001. (PSOF at para. 36). The two items on the agenda were consideration of the performance and continued employment of the City Manager and possible action concerning the general philosophy and policies of the City Manager in City Government. (PSOF at para. 36). This

meeting did not occur due to scheduling problems of City Council Members. (id..).

In or about October 2001, Mayor Slavens expressed concern in a memorandum to City Council members that Plaintiff was improperly interjecting himself into the policy decisions of the City Council, including issues related to the PEU. (PSOF at para. 39). In late October 2001, Plaintiff responded in a memorandum to Mayor Slavens, stating, *inter alia*, that he believed that Slavens was retaliating against him and attempting to have Plaintiff's employment terminated. (PSOF at para. 41).

In November 2001, Mayor Slavens scheduled a Special Meeting of the City Council to discuss Plaintiff and the City Manager position. (PSOF at para. 44). When Plaintiff received notice that a City Council Meeting was scheduled for November 14, 2001, he demanded that the meeting be held in open session. (PSOF at para. 48). According to the Plaintiff, during this meeting he was criticized for the termination of the City Fire Chief. (PSOF at para. 50).

On December 19, 2001, a Special Meeting of the City Council was held to discuss the termination of the City Manager pursuant to his employment contract. (PSOF at para. 55-56). During the meeting, Councilor Brown distributed a packet of information, including newspaper articles, about Plaintiff. (PSOF at paras. 57-60). The day after the Council Meeting, Plaintiff contacted attorney A. Dean Pickett. (PSOF at para. 61). By letter dated December 31, 2001, attorney Pickett, formally notified Plaintiff that he could request a name-clearing hearing regarding comments made at the December 19th Council Meeting. In January 2002, Plaintiff received a five per cent increase to his base salary. (PSOF at para.

66). Discussions and disagreement concerning the PEU continued during the first three months of 2002. (PSOF at paras. 65, 67, 69-70, 72). Plaintiff contends that he was excluded from the discussions held in Executive Session at the April 11, 2002 City Council Regular Meeting. (PSOF at paras. 76-77).

Meanwhile, efforts had been underway to formulate an Evaluation Form for the City Manager position. (PSOF at paras. 78). A special Meeting of the City Council was scheduled for April 29, 2002. (PSOF at para. 80). Agenda items for this Special Meeting included discussions concerning the procedure for evaluating the City Manager position, Plaintiff's performance as City Manager and Plaintiff's continued employment or severance. (PDOF at para. 80). The Special Meeting, however, was cancelled. (PSOF at para. 81).

On May 2, 2002, a Notice of a Special Meeting of the City Council to be held on May 7, 2002 was posted at various buildings in Page, including the City Hall, the Justice Building, and the United States Post Office. (DSOF, at Exhibit 4). The agenda included discussion and action on Plaintiff's evaluation and continued employment. (id.). Prior to the meeting, Plaintiff through counsel requested that any discussions or consideration of his employment performance be conducted in a public meeting. (PSOF at para. 84).

At the May 7th Special Meeting, the City Council went into Executive Session at 5:35 p.m. (PSOF at para. 87). When the Council re-convened in Regular Session at 7:07 p.m., a motion was made to terminate Plaintiff's employment as City Manager. The motion was seconded and discussion occurred during this regular meeting. The motion

was withdrawn and further discussion occurred in the public session. (DSOF, at Exhibit 5, Minutes of the Special Meeting of May 7, 2002, pages 1-2). During this discussion, an evaluation form was adopted. (DSOF, at ¶ 16 – Exhibit 5; PSOF at para. 89). It further appears that a recess occurred so Members of the Council could fill out the evaluation form. The City Council went into Executive Session from 8:10 p.m. until 9:13 p.m. (PSOF at para. 89). The City Council Regular Session reconvened at 9:13 p.m. during which Plaintiff, represented by counsel, requested that discussion concerning his employment occur in public session and Plaintiff waived his right to privacy. (DSOF, at ¶ 16 – Exhibit 5, at page 3; PSOF at para. 90). After Plaintiff's comments were read, the City Council went into Executive Session at 9:50 p.m. (PSOF at para. 95). The Regular session reconvened at 10:00 p.m. (PSOF at para. 95). Defendant Councilor Brown moved to terminate Plaintiff's employment, effective immediately, as per the terms of the Employment Agreement, with two months severance pay. Defendant Councilor Berry seconded the motion. (PSOF at para. 96). After further discussion, the motion carried. (DSOF, at ¶ 17 – Exhibit 5, at pp. 4-5). Plaintiff received a lump sum payment equal to two months salary as severance pay. (DSOF, at ¶ 18 – Exhibit 3, para. 6 [Affidavit of Defendant Salvens]).

IV.

Discussion.

(A) Plaintiff's claims for breach of contract (Count 1) and breach of the covenant of good faith and fair dealing (Count II).

With respect to Plaintiff's claims asserted in Counts I and II, Plaintiff contends that Defendants violated his Employment Agreement by failing to properly conduct performance evaluations, by improperly defining and prioritizing the goals for the City Manager and by wrongfully terminating the Agreement. As an additional ground in support of his second claim for relief, Plaintiff contends that the City permitted the City Council to interfere with Plaintiff's Employment Agreement. Defendants have moved for summary judgment on these two claims, contending that Plaintiff's Employment Agreement was unenforceable. Defendants also contend that Plaintiff's Employment Agreement was properly terminated in accordance with A.R.S. § 9-303(C), Page City Code § 3-2-1(A) and under the terms of the Agreement itself, and that the City has discharged its obligations by performance.

Defendants' contention that Plaintiff's Employment Agreement is unenforceable is based on the exception to the successor board doctrine. The Arizona Supreme Court explained in Town of Temp v. Corbell, 17 Ariz. 1, 147P. 745 (1915), the "general rule" that a contract extending beyond the term of office of the members of a public board remains valid if entered into in good faith. A public policy exception to the rule exists applicable to contracts in reference to matters which are personal to the board in their nature. Id., at 8, 147 P. at 748. Defendants cite Serna v. Pima County, 185 Ariz. 380, 916 P.2d 1096 (Ariz. App. 1995), in support of their contention. In Serna, the plaintiff was employed as the County Manager of Pima County. On June 13, 1992, the County Board of Supervisors voted to extend the plaintiff's contract for two years. New Board members were elected in November 1992 who took office in January 1993. The new Board voted to

terminate the plaintiff's employment and plaintiff sued for severance pay. The trial court granted summary judgment in favor of the County. In affirming the judgment, the Arizona Court of Appeals explained as follows:

> The basis for the judgment below was the longstanding Arizona rule that while a political entity can ordinarily enter into contracts extending beyond the political life of the entity's governing board, it cannot do so where the contract is for personal or professional services for the board itself. ...As put in [Pima County v.] Grossetta, [54 Ariz. 530, 97 P.2d 538 (1939)], 'if ...the contract is for the performance of personal or professional services for the employing officers, their successors must be allowed to choose for themselves those persons on whose honesty, skill and ability they must rely.' 54 Ariz. at 538, 97 P.2d at 541. Or, to phrase it in more modern terms, publicly elected officials must have the freedom to appoint those high level executive and administrative officers on which the success of a political policy must rest. If it were otherwise, political democracy might falter because those popularly elected might be unable to carry out the policies that caused their election due to an entrenched permanent bureaucracy not answerable to the electorate.

Serna, 185 Ariz. at 381, 916 P.2d at 1097.

In the instant case, the terms of Plaintiff's Agreement provided that he served as City Manager at the pleasure of the "governing body" of the City, that is, the City Council. Section 3-2-1(A) of the City Code provided that the City Manager of the City of Page held office "for and at the pleasure of the Council." Plaintiff's Agreement provided that Plaintiff as City Manager was required to perform the functions and duties not only as provided by the City Code but also "other legally permissible and proper duties and functions as the City Council shall from time to time assign." At the time of the events at issue, Section 3-2-1(E) of the City Code provided that the City Manager was the "administrative head of the government of the City under the direction and control of the Council" except as otherwise provided and that he "shall be responsible to the Council for the proper administration of all affairs of the City." Plaintiff therefore was answerable to the City Council.

Plaintiff's Employment Agreement, dated December 11, 2000, became effective commencing between January 2, 2001 and February 1, 2001. Plaintiff's Agreement was executed during the term of a City Council whose tenure expired when the new City Council was seated on May 31, 2001. Based on the authority discussed above, the City Council who hired Plaintiff was prohibited from binding successor City Councils with respect to Plaintiff's employment contract. Since Plaintiff's Employment Agreement provided that he was answerable to the City Council, the newly elected City Council was entitled to select the City Manager. As noted in Greenawalt v. Sun City West Fire District, 250 F.Supp.2d 1200, 1212 (D.Ariz. 2003), Arizona courts have applied the exception to key personnel hired directly by boards to personally serve them. "These courts recognize

that the public policy reasons behind the exception only applies to such individual personnel because boards must be free to hire and fire such persons to ensure the implementation of their directives and advancement of their political policies." Id. Plaintiff as City Manager, and pursuant to the terms of his Employment Agreement and his duties as City Manager, occupied a key personnel position. Plaintiff's Employment Agreement was subject to cancellation under the exception to the successor board doctrine.

Plaintiff contends that since the City Council did not immediately terminate his employment contract when it was seated but permitted him to serve for a period of months, the Council effectively ratified his contract. The personal services contract extending beyond the political life of the Council that awarded it is void as against public policy. A void contract cannot be ratified. Princess Plaza Partners v. State, 187 Ariz. 214, 222, 928 P.2d 638, 646 & n.5 (Ariz. App. 1995)(citing Hodges v. Hodges, 118 Ariz. 572, 578 P.2d 1001 (Ariz. App. 1978)).

Defendants are further entitled to summary judgment on Count I based on an alternative theory. Plaintiff's Employment Agreement was subject to cancellation without cause by majority vote of the City Council. Pursuant to A.R.S. § 9-303(C), "[t]he person appointed to the office of city or town manager shall serve at the pleasure of the governing body of the city or town and may be removed without cause by a majority vote thereof." Sections 3-2-1(A) and (D) of the City Code similarly provide that the City Manager of the City of Page holds office for and at the pleasure of the Council and can be removed by a majority vote of the entire Council. Plaintiff's

employment therefore was terminable at the will of the City Council.

In the event Plaintiff's employment was terminated without cause, the Agreement required that Plaintiff be paid a lump sum severance in an amount equal to two months of the City Manager's base salary. Defendants have offered undisputed evidence that the City fulfilled its obligation under the Agreement by paying Plaintiff this amount upon termination of his employment. Defendants are entitled to summary judgment on Plaintiff's breach of contract claim asserted in Count I.

With respect to Plaintiff's claim based on the breach of the covenant of good faith and fair dealing asserted in Count II, Arizona courts have expressly rejected such a tort claim in the context of an employment contract. Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 198, 888 P.2d 1375, 1385 (Ariz. App. 1994). Although the Arizona Supreme Court in Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985), specifically recognized the covenant of good faith and fair dealing in the employment-at-will contract situation, the Arizona Employment Protection Act, A.R.S. § 23-1501 et seq., overruled Wagenseller and limited the grounds under which an employee could claim wrongful termination. See Chaboya v. American Nat. Red Cross, 72 F. Supp. 2d 1081, 1092 (D.Ariz. 1999). Defendants have not sought summary judgment on Plaintiff's claim asserted in Count III based on violation of the Arizona Employment Protection Act. Defendants' motion for summary judgment as to Count II is granted.

(B) Plaintiff's claim for violation of due process based on deprivation of property rights, liberty

interests, free speech, privacy rights and unlawful retaliation under 42 U.S.C. § 1983 (Count IV).

Defendants have moved for summary judgment on Plaintiff's § 1983 claim on the grounds that (i) Plaintiff had no expectation of continued employment and thus no property interest in his position as City Manager; (ii) Plaintiff was a policy-making official with no due process rights; (iii) Defendants Slavens and Brown are entitled to legislative immunity regarding Plaintiff's claim of "false public statements" in violation of due process (iv) and, Plaintiff was afforded a "name-clearing" hearing regarding his claim based on violation of liberty interest.

First, to show entitlement to due process protection, Plaintiff must establish an expectation in continued employment based on some state statute, city ordinance or express or implied contract. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976). As the Court has found in the above discussion, Plaintiff served at the will of the City Council and his employment was terminable without cause. Pursuant to the terms of the Employment Agreement Plaintiff had no expectation in continued employment as the City Manager. See, e.g., Brady v. Gebbie, 859 F.2d 1543, 1548 (9th Cir. 1988)("where state employees serve at the will of the appointed authority ... there is no such reasonable expectation of continued employment, and thus no property right"). See also, Tryon v. Avra Valley Fire District, 659 F. Supp. 283 (D.Ariz. 1986)(town fire chief had no claim under § 1983 regarding property interest in his job because his employment contract extended beyond the term of the Board of Directors for the Fire District awarding it).

Next, Defendants contend that Plaintiff held a policymaking office and thus his employment termination is not subject to attack under the First and Fourteenth Amendments. An employee in a policymaking position can be terminated for purely political reasons without offending the First Amendment. See Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287 (1980).

In determining whether a public employee holds a policymaking position, the Ninth Circuit has outlined the following factors to be considered:

> whether the individual has 'vague or broad responsibilities,' in addition to the individual's 'relative pay, technical competence, power to control others, authority to speak in the name of policy makers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.'

Biggs v. Best, Best & Krieger, 189 F.3d 989, 995 (9th Cir. 1999). The Ninth Circuit explained in Fazio v. City and County of San Francisco, 125 F.3d 1328, 1334 (9th Cir. 1997), that "[a] public employee need not literally make policy in order to fit within the Elrod policy maker exception. Rather, an employer may fire a public employee for purely political reasons if the employer can demonstrate that the political considerations are 'appropriate requirement[s] for the effective performance' of the job."

For the reasons advanced by Defendants, the Court concludes that the City Manager position satisfies the above criteria. Plaintiff's responsibilities as City Manager were vague and broad. Plaintiff's salary was approximately $100,000.00 per year, increased by five percent after one year on the job. Plaintiff's "technical competence" included his previously held position as Chief Administrative Officer in Ravalli County, Hamilton, Montana. Plaintiff as Page City Manager had the power to control others in that he had the authority to appoint, and when necessary, to suspend or remove all officers and employees of the City not appointed by the Council, such as, for example, the Fire Chief position. See Page City Code Section 3-2-1(E)(1). Plaintiff's position included influence on programs, such as his recommendations regarding the PEU and an economic development strategy. As City Manager, Plaintiff had contact with the Mayor and City Council, elected officials. Plaintiff as City Manager served at the pleasure of the City Council and thus was responsive to partisan politics and political leaders. Arizona courts have found that political loyalty and allegiance are appropriate requirements for the successful performance of such positions as County Manger, Serna, 916 P.2d at 1097; County Engineer, Olmsted & Gillelen v. Hesla, 24 Ariz. 546, 211 P. 589 (1922); and for those providing personal and professional services. Pima County v. Grossetta, 54 Ariz. 530, 97 P.2d 538 (1939); City of Phoenix v. Long, 158 Ariz. 59, 761 P.2d 133 (Ariz. App. 1988).

Third, regarding Plaintiff's liberty interest claim, Plaintiff must show that the employment decision was accompanied by a charge against him that might seriously damage his standing and associations in the community or imposed on him a stigma or other disability that foreclosed his freedom

to take advantage of other employment opportunities. Ulrich v. City and County of San Francisco, 308 F.3d 968, 982 (9th Cir. 2002)(quoting Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701 (1972)). Within the Ninth Circuit a statement does not implicate an employee's liberty interest if it is merely defamatory, unless the defamation is made in connection with the loss of a government benefit, such as employment. Steisberg v. State of Cal., 80 F.3d 353, 357 (9th Cir. 1996). The statements must be statements to the public. See Ulrich, 308 F.3d at 982-83. An employee whose dismissal implicates a liberty interest is not entitled to his job back, but is entitled to a name-clearing hearing which need not be a formal one. Roth, 408 U.S., at 573 & n.12.

The undisputed facts indicate that Plaintiff was offered a name-clearing hearing following the December 19, 2001 City Council Meeting at which Defendant Councilor Brown allegedly made statements that "disparaged" Plaintiff's character. Plaintiff requested that the May 7, 2002 City Council Meeting be held in open session regarding the discussions on his employment performance and termination. Plaintiff also waived his right to privacy at that meeting. In Sanchez v. Coxon, 175 Ariz. 93, 854 P.2d 126 (1993), the Arizona Supreme Court applied the absolute legislative privilege to City Council Members for statements made in the performance of their duties as City Council.

Finally, Plaintiff contends in his Complaint that he was denied a pre-termination and post-termination hearing. However, Plaintiff's Employment Agreement provided the "entire agreement" concerning his employment with the City and by the Agreement's terms "no other provisions of

any laws, ordinances, rules or regulations pertaining to the employees of the City of Page" applied to Plaintiff. Defendants' motion for summary judgment as to Plaintiff's Count IV is granted.

(C) Plaintiff's claim for interference with contract rights (Count V).

In Count V Plaintiff seeks compensatory and punitive damages based on the claim that Mayor Slavens and the City Council "intentionally and wrongfully" interfered with his employment contract. The tort of wrongful interference with a contract requires that the contract must be one between the plaintiff and a third party. Payne v. Pennzoil Corp., 138 Ariz. 52, 56, 672 P.2d 1322, 1326 (Ariz. App. 1983). As Defendants point out in their summary judgment motion, Plaintiff's employment contract was between Plaintiff and the City of Page, his employer. Plaintiff as City Manager served at the pleasure of the City Council. There can be no claim based on actions by the Mayor and Council, representatives of the City, interfering with a City employment contract. Defendants' motion for summary judgment as to Count V is granted.

(D) Plaintiff's claim for violation of Arizona's Open Meeting Laws (Count VI).

Plaintiff contends that Defendants violated Arizona's Open Meeting Laws at the May 7, 2002 Council Meeting during which his employment was terminated by engaging in unlawful meetings described as "executive sessions." (Complaint at ¶¶ 58-59). Plaintiff asserts additional violations based on "other occasions", including "executive sessions", "telephone calls, e-mail and by other means" which

are not described or identified more specifically by date or factual allegation in the Complaint.

Arizona's Open Meetings requirements are set forth at Title 38, Chapter 3, Article 3.1 of the Arizona Revised Statutes. Meetings are required to be open to the public. A.R.S. § 38-431.01. Public notice shall be provided to all meetings of public bodies. A.R.S. § 38-431.02. Executive sessions are authorized to permit the public body to consult with legal counsel. A.R.S. § 38-431.03(A)(3). Discussions or considerations of employment matters may be held in executive session but, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. A.R.S. § 38-431.03 (A)(1).

The notice and agenda for the May 7, 2002 Council Meeting was posted on May 2, 2002 at various public places in the City of Page, including the Page City Hall, the Page Justice Building and the U.S. Post Office. In support of their summary judgment motion, Defendants have provided the minutes of the May 7th Council Special Meeting which indicate that the attorney advising the City Council provided an overview of the purpose of the first executive session called that evening. Plaintiff has provided the transcript of the May 7th Special Meeting. (PSOF at Exhibit "BO"). The transcript indicates that the first executive session was called by Mayor Slavens to consult with legal counsel. Following the first "executive session" legal counsel stated that "[t]he purpose of the session was to be able to engage in a give-and-take necessary for me to offer legal advice to the council and discuss legal issues set forth on other items on the agenda." Explanations regarding the executive sessions that

followed are unclear from the discussion contained in the minutes and transcript.

In Fisher v. Maricopa County Stadium District, 185 Ariz. 116, 912 P.2d 1345 (Ariz. App. 1996), a taxpayer challenged the legality of four closed-door executive meetings of the County Stadium District under Arizona's Open Meeting Law. The trial court granted the Stadium District's motion for summary judgment and the Arizona Court of Appeals reversed. The Court of Appeals first held that after a plaintiff, who is challenging an executive session under the Open Meeting Law, has filed a complaint alleging facts from which a reasonable inference may be drawn supporting an Open Meeting Law violation, the burden shifts to the defendant to prove that an affirmative defense or exemption, should permit a closed-door session. Id., 185 Ariz. at 121, 912 P.2d at 1350. Next, the Court discussed the meaning of "legal advice" regarding the exemption concerning "discussicn or consultation for legal advice with the attorney or attorneys of the public body" and held that "[t]he presence of an attorney 'at an executive session cannot be used to circumvent the open meeting law requirements.'" Id., 185 Ariz. at 124, 912 P.2d at 1353. Finally, the Court of Appeals held that the trial court should have considered the executive session minutes and any other relevant evidence in determining whether the Stadium District violated the Open Meeting Law by going beyond the description of "legal advice" during the closed-door session. Id.

As discussed above, the minutes and transcript of the May 7th Special Meeting have been submitted by the parties. Defendants have not provided the minutes of the executive sessions that occurred during the May 7th Special Meeting. Based

on the rationale discussed in Fisher, a genuine issue of material fact exists regarding what occurred during the Executive Sessions. Defendants' motion for summary judgment on Count VI is denied.

Defendants filed the motion for partial summary judgment after filing an Answer (Doc. 12) but before discovery commenced in this case. The docket sheet indicates that the parties have proceeded with discovery while the summary judgment motion was pending. However, a Scheduling Conference has not been held in this case. The Court will issue an Order for Scheduling Conference under Fed.R.Civ.P.16.

Accordingly,

IT IS ORDERED that Defendants' motion to strike (Doc. 20) is granted. Plaintiff's Statement of the Facts at paragraphs 51, 62, 63 and 68 and Plaintiff's Exhibits AN, AT, AU and AY shall be stricken from the record. The Court may reconsider this ruling upon a proper showing that the attorney-client privilege as to these matters has been waived or does not apply.

IT IS FURTHER ORDERED that Defendants' motion for partial summary judgment (Doc. 13) is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendant's motion for partial summary judgment is granted as to Plaintiff's claims set forth in Counts I, II, IV, and V.

IT IS FURTHER ORDERED that Defendants' motion for partial summary judgment is denied as to Plaintiff's claim set forth in Count VI.

No. CIV 03-0847-PCT-MHM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DONALD K. KLEPPER,
Plaintiff,

v.

The CITY OF PAGE, an Arizona municipal corporation; et al.,
Defendants.

January 21, 2005
January 25, 2005 Filed

Before: HON. MARY H. MURGUIA, United States District Judge.

OPINION: ORDER

On September 29, 2004, the Court entered an Order granting in part and denying in part Defendants' motion for partial summary judgment. (Doc. 66). The Court granted summary judgment in Defendants' favor on Plaintiff's federal claims based on violation of due process premised on deprivation of property rights, liberty interest, free speech, privacy rights and unlawful retaliation under 42 U.S.C. § 1983 (Count IV), and his state or common law claims based on breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and tortious interference with contractual relations (Count V). The Court denied Defendants' motion for summary judgment based on violation of Arizona's Open Meeting Law (Count VI). Plaintiff's other remaining claim is based on violation of the Arizona Employment Protection Act, A.R.S. §§

23-1501 et seq. ("AEPA") (Count III). Plaintiff's claims in this case center around the termination of his employment as City Manager of the City of Page, Arizona.

Plaintiff, who is proceeding pro se, has filed a motion seeking certification under Fed.R.Civ.P. 54(b) of the Court's Order on partial summary judgment. (Doc. 74-1). Defendants have filed a similar motion seeking entry of judgment under Rule 54(b). (Doc. 71). Defendants have filed a response to Plaintiff's motion for Rule 54(b) certification. (Doc. 81). The Court briefly heard oral argument on the parties' motions on November 1, 2004. Following the November 1st hearing, Plaintiff filed a reply on November 12, 2004. (Doc. 86). This Court's jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332, and supplemental jurisdiction, 28 U.S.C. § 1367.

Orders granting partial summary judgment, because they do not dispose of all claims, are not final and appealable orders under 28 U.S.C. § 1291. Parties ordinarily must obtain certification under Fed.R.Civ.P.54(b) in order to appeal partial summary judgments. Rule 54(b) provides in relevant part that

> [w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Within the Ninth Circuit, "Rule 54(b) certification is proper if it will aid 'expeditious decision' of the case." Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797-98 (9th Cir. 1991). It is not necessary that the Rule 54(b) claims be separate from and independent of the remaining claims. Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 468 (9th Cir. 1987). The court should not certify a Rule 54(b) judgment if such would result in piecemeal appeals of a case which should be reviewed as a single unit. See Curtiss-Wright Corp. v. General Electric Co., 446 U.S.1, 10, 100 S.Ct. 1460 (1980).

Once the court has determined that an order is eligible for certification under Rule 54(b) because the order finally disposes of a cognizable claim for relief, the court must determine whether there is any just reason for delay in entering the order as a judgment. The court may consider such factors as (1) judicial administrative interests, (2) whether the claims under review were separable from the others remaining to be adjudicated and (3) whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals. Id., 446 U.S. at 7-13. The decision to grant a Rule 54(b) certification is addressed to the sound discretion of the trial court. Id., at 8.

Defendants contend in their motion for certification that the evidence relevant to Plaintiff's AEPA claim involves Plaintiff's activity relevant to issues concerning the Page Electric Utility. Plaintiff's claim based on violation of Arizona's Open Meeting Law concerns facts relevant to whether Defendants made decisions concerning Plaintiff's employment in meetings that were required to be open to the public.

Defendants contend that the evidence related to both of these remaining claims does not relate to Plaintiff's breach of contract claim or his federal claim which were the subject of the partial summary judgment ruling. Defendants seek entry of judgment, claiming that "[c]ertification of judgment under Rule 54(b) will permit the Court to determine entitlement and an amount of fees to be awarded based upon the dismissal of those Counts pursuant to which the prevailing party would be entitled to an award of fees." (Doc. 71, at p. 4).

In his motion for Rule 54(b) certification, Plaintiff contends that the claims which were the subject of the summary judgment ruling arise out of the same transaction and facts that will be presented at trial on the remaining claims. Plaintiff contends that it is impossible to sever the remaining claims or have separate trials on the various claims. Plaintiff makes it clear in his reply that he is not now seeking to have the remaining claims stayed while the appeal of the determined claims proceeds. Plaintiff states, however, that he will move for a stay of these proceedings if the Court grants the parties' requests for certification. Plaintiff states in his reply that

> ...Plaintiff intends to file a motion requesting a stay of these proceedings because it makes absolutely no sense to have a trial where the exact same facts that will be used to prove all of Plaintiff's claims, including those on appeal, be tried once, and then tried again a second time after Plaintiff is successful on appeal. (Doc. 86 at p. 5).

The Court has considered the motions for Rule 54(b) certification filed by the parties. Plaintiff's

remaining claims may be considered separate and apart, that is, based on distinct legal theories, from the claims decided on partial summary judgment. It does not appear that the Court of Appeals for the Ninth Circuit will be required to decide the same issues more than once even if there are subsequent appeals.

It does appear, however, that there will be some duplication of the evidence. The evidence relevant to the remaining claims involves Plaintiff's employment as well as the termination of his employment. The Court has now entered a Scheduling Order pursuant to Fed.R.Civ.P. 16 as to Plaintiff's remaining claims. The cutoff date for discovery is May 2, 2005 and the dispositive motions deadline is July 1, 2005. (Doc. 82). The docket sheet contains notations indicating that the parties have been engaged in discovery since at least January 12, 2004. (Doc. 26). The parties thus were engaged in discovery while Defendants' motion for partial summary judgment, filed on October 2, 2003 (Doc. 13), was pending. The parties therefore have been proceeding forward with discovery and this case likely will be ready for trial by the summer of 2005. It does not appear to the Court that certification under Rule 54(b) will aid in the "expeditious decision" in this case. Rather, certification under Rule 54(b) essentially will result in piecemeal litigation as opposed to further serving the administration of justice. The Court, in the exercise of its discretion, concludes that the parties' motions for Rule 54(b) certification should be denied.

Several motions remain pending in this case. Defendants have filed a motion for attorneys' fees (Doc. 70) and a memorandum in support. (Doc. 88). On November 8, 2004, Plaintiff filed a notice of intent

to respond to Defendants' motion for attorneys' fees. (Doc. 83). Plaintiff recently filed a motion to dismiss Defendants' motion for attorneys' fees. (Doc. 92).

Plaintiff has filed a motion to amend the complaint (Doc. 53) and several motions to compel discovery. (Doc. 54-59, 63). Defendants have filed a motion to strike attachments to Plaintiff's reply regarding Plaintiff's motions to compel discovery. (Doc. 69).

The parties are directed to file a joint report notifying the Court of the status of these motions, that is, whether the parties seek a ruling as to these motions or whether any of these motions have become moot as a result of the Court's partial summary judgment ruling or its present ruling denying Rule 54(b) certification. The parties' joint report shall be filed on or before February 7, 2005.

Plaintiff has filed a motion seeking an extension of time to submit a request asking for reconsideration of the Court's ruling, during the proceedings on partial summary judgment, striking certain of Plaintiff's exhibits as protected by the attorney-client privilege. (Doc. 84). Plaintiff has asked that he be allowed to file his motion for reconsideration up to and until sixty (60) days after the Court has ruled on his motions to compel. The Court will defer ruling on Plaintiff's motion for an extension of time until after the parties file their joint status report on pending motions.

Accordingly,

IT IS ORDERED that Defendants' motion for entry of judgment under Rule 54(b) (Doc. 71-1) is denied.

IT IS FURTHER ORDERED that Plaintiff's motion for Rule 54(b) certification (Doc. 74-1) is denied.

IT IS FURTHER ORDERED that the parties shall file a joint status report notifying the Court of the status of pending motions. (Doc. 53-59, 63, 69 & 70) on or before February 7, 2005.

No. CIV 03-0847-PCT-MHM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DONALD K. KLEPPER,
Plaintiff,

v.

The CITY OF PAGE, an Arizona municipal corporation; et al.,
Defendants.

March 16, 2005
March 24, 2005 Filed

Before: HON. MARY H. MURGUIA, United States District Judge.

OPINION: ORDER

On September 29, 2004, the Court entered an Order granting in part and denying in part Defendants' motion for partial summary judgment. (Doc. 66). The Court granted summary judgment in Defendants' favor on Plaintiff's federal claims based on violation of due process premised on deprivation of property rights, liberty interest, free speech, privacy rights and unlawful retaliation under 42 U.S.C. § 1983 (Count IV), and his state or common law claims based on breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and tortious interference with contractual relations (Count V). The Court denied Defendants' motion for summary judgment based on violation of Arizona's Open Meeting Law (Count VI). Plaintiff's other remaining claim is based on violation

of the Arizona Employment Protection Act, A.R.S. §§ 23-1501 et seq. ("AEPA") (Count III).

Following entry of the Order on summary judgment, the parties filed cross motions for entry of judgment under Fed.R.Civ.P. 54(b) (Doc. 71 & 74) which the Court denied in an Order entered on January 25, 2005. (Doc. 96). On February 14, 2005, Plaintiff, who is proceeding pro se, filed a motion for voluntary dismissal of Counts III and VI, the remaining claims at issue in this lawsuit, under Fed.R.Civ.P.41(a)(2), supported by a memorandum of authority. (Doc. 100). Defendants have filed a response (Doc. 103 to Plaintiff's motion for voluntary dismissal and Plaintiff has filed a reply. (Doc. 105). The Court enters this Order on Plaintiff's motion for voluntary dismissal of remaining claims.

Plaintiff has moved for voluntary dismissal of his remaining claims "without prejudice" so that final judgment can be entered in this case and he can proceed to appeal the Court's ruling adverse to him in the Order on partial summary judgment. Plaintiff states that he has determined that trial on his two remaining claims would not be an efficient use of time and resources. Defendants have filed a response stating no objection to Plaintiff's motion for voluntary dismissal of remaining claims so long as Plaintiff withdraws his pending motion to file an amended complaint. (Doc. 103). Defendants state in relevant part in their response that "[t]o bring finality to these issues so that the plaintiff may pursue his appeal, defendants submit to the Court that the withdrawal or denial of plaintiff's Motion to Amend is appropriate as a condition to granting the Motion to Dismiss." (Doc. 103, at p.2). Plaintiff in his motion to amend the complaint had sought to add a claim for defamation. (Doc. 53). Plaintiff states in his reply

filed February 28, 2005 that he has contemporaneously filed notice that he is withdrawing his motion to amend the complaint. The docket sheet shows that on February 28, 2005, Plaintiff filed notice that he was withdrawing his motion to amend the complaint. (Doc.104). The docket no longer shows that Plaintiff's motion to file an amended complaint is pending in this case.

Pursuant to Rule 41(a)(2), and except as provided in Rule 41(a)(1), "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." As further provided in Rule 41(a)(2), unless otherwise specified in the order, dismissal is without prejudice.

The Court noted in its Order filed on January 25th that orders granting partial summary judgment, because they do not dispose of all claims, are not final and appealable orders under 28 U.S.C. § 1291. The Court of Appeals has explained, however, that "[j]udgments whose finality would normally depend upon a [Fed.R.Civ.P.] 54(b) certificate may be treated as final and appealable under § 1291 if remaining claims subsequently have been finalized." American States Ins. Co. v. Dastar Corp., 318 F.3d 881, 884-85 (9th Cir. 2003)(quoting Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073, 1075 (9th Cir. 1994)). The judgment upon such an order dismissing all remaining claims without prejudice with the approval of the district court, will be considered "final and appealable" under § 1291 where the "record reveals no evidence of intent to manipulate ... appellate jurisdiction." American States, 318 F.3d at 885 (quoting James v. Price Stern Sloan, Inc., 281 F.3d 1064, 1070 (9th Cir. 2002)). The Ninth Circuit reiterated in American

States that a "significant concern" under such circumstances is whether the parties have attempted to manipulate appellate jurisdiction. Id., at 885.

Factors that weight against a finding of improper manipulation as discussed in American States are present here. There is no evidence that the parties have entered into an agreement or stipulation to dismiss the remaining claims. There also is no evidence that the parties have entered into a stipulation tolling the statute of limitations relevant to the remaining claims. "[W]hen the parties do not toll the limitations period, a 'plaintiff assumes the risk [that] by the time the case returns to district court, the claim will be barred by the statute of limitations or laches.'" American States, 318 F.3d at 887 (quoting James, 283 F.3d at 1066).

Another factor highlighted as significant in American States is the Court's participation in the dismissal as indicative that it has considered the appropriateness of dismissing remaining claims without prejudice. The Court has previously entered an order denying the parties' cross motions for entry of judgment under Rule 54(b). Plaintiff has now moved for voluntary dismissal of the two remaining claims so he can appeal the Court's order on partial summary judgment. Plaintiff has indicated in his motion to dismiss a desire to end this litigation in order to minimize costs and expenses as would be associated with further litigation. Defendants have stated no objection to dismissal save on condition that Plaintiff withdraw his motion to amend the complaint, a step which Plaintiff has already undertaken. Defendants have not identified any prejudice resulting from Plaintiff's voluntary dismissal of remaining claims.

Plaintiff has moved for voluntary dismissal of the remaining claims "without prejudice." The Ninth Circuit in James recognized that "a dismissal of some claims without prejudice always presents a possibility that the dismissing party would attempt to resurrect them in the event of reversal." Id., 283 F.3d at 1066. However, as indicated above, Plaintiff's motion to dismiss is unilateral and therefore "less likely to reflect manipulation." Id. Moreover, Plaintiff has requested that, upon dismissal of his remaining claims, final judgment should be entered in this case.

The Court concludes that it is appropriate to grant Plaintiff's motion for voluntary dismissal of Counts III and VI, Plaintiff's remaining claims in this lawsuit. Dismissal of these counts will result in the disposition of all pending claims. Dismissal of Counts III and VI shall be without prejudice. Judgment shall be entered in accordance with the Court's Order on partial summary judgment (Doc. 66) and in accordance with this Order granting Plaintiff's motion for voluntary dismissal of Counts III and VI without prejudice. All other pending motions shall be denied as moot.

Accordingly,

IT IS ORDERED that Plaintiff's motion for voluntary dismissal of Counts III and VI (Doc. 100), the remaining claims in this lawsuit, is granted.

IT IS FURTHER ORDERED that Plaintiff's claims asserted in Counts III and VI shall be dismissed without prejudice.

IT IS FURTHER ORDERED that all remaining pending motions, including Plaintiff's several motions

to compel discovery (Doc. 54-59 & 63), Plaintiff's motion for extension of time, etc., (Doc. 84), Plaintiff's motion to dismiss Defendants' motion for an award of attorneys' fees (Doc. 92), Plaintiff's motion for opportunity to respond, etc., (Doc. 95), Defendants' motion to strike attachments (Doc. 69), and Defendants' motion for an award of attorneys' fees (Doc. 70-1) are denied as moot.

IT IS FURTHER ORDERED that the Judgment entered in this case shall be a Final Judgment. Said Final Judgment shall reflect the Court's present Order dismissing Plaintiff's Counts III and VI without prejudice and the Court's Order on partial summary judgment entered on September 29, 2004. (Doc. 66).

No. CIV 03-0847-PCT-MHM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DONALD K. KLEPPER,
Plaintiff,

v.

The CITY OF PAGE, an Arizona municipal corporation; et al.,
Defendants.

March 27, 2006

Before: HON. MARY H. MURGUIA, United States District Judge.

OPINION: ORDER

Defendants have filed a motion for attorney's fees (Doc. 108), a supplemental statement for consultation (Doc. 111) and supporting memorandum. (Doc. 110). Plaintiff pro se has filed a response in opposition (Doc. 112) and Defendants have filed a reply (Doc. 113). The Court has determined that oral argument would not materially assist in the disposition of Defendants' motion for attorney's fees.

I.

Background.

Plaintiff filed this action asserting six claims for relief based on the termination of his contract as City Manager for the City of Page, Arizona. The named Defendants included the City of Page, J. Dean

Slavens, the Mayor of the City of Page, and City Councilors of the City of Page Wes Berry, Dan Brown, John Kocjan, and William R. Robinson. Defendants filed a motion for partial summary judgment within approximately two weeks of filing an answer to the complaint. (Doc. 12, 13). On September 29, 2004, the Court entered an Order granting in part and denying in part Defendants' motion for partial summary judgment. (Doc. 66). The Court granted summary judgment in Defendants' favor on Plaintiff's federal claims based on violation of due process premised on deprivation of property rights, liberty interest, free speech, privacy rights and unlawful retaliation under 42 U.S.C. § 1983 (Count IV), and his state or common law claims based on breach of contract (Count I), breach of implied covenant of good faith and fair dealing (Count II), and tortious interference with contractual relations (Count V). The Court denied Defendants' summary judgment motion as to the claim based on violation of Arizona's Open Meeting Law (Count VI). Plaintiff's remaining claim was based on violation of the Arizona Employment Protection Act, A.R.S. §§ 23-1501 et seq. ("AEPA") (Count III). Defendants' motion for partial summary judgment did not address Plaintiff's AEPA claim.

Following entry of the Order on summary judgment, the parties filed cross motions for entry of judgment under Fed.R.Civ.P.54(b). The Court issued an Order denying these motions. (Doc. 96). Plaintiff thereafter filed a motion for voluntary dismissal of his remaining claims asserted in Counts III and VI, under Fed.R.Civ.P.41(a)(2). Plaintiff moved for voluntary dismissal of these claims without prejudice asking that judgment be entered so he could proceed with an appeal of the Order on partial summary judgment. Defendants did not oppose Plaintiff's

motion so long as Plaintiff withdrew his motion to file an amended complaint seeking to add a defamation claim which was pending at that time. Plaintiff thereafter filed a notice that he was withdrawing his motion to amend the complaint. The Court entered an Order granting Plaintiff's voluntary dismissal of his remaining claims (Counts III and VI). These claims were dismissed without prejudice and a Final Judgment was entered. Plaintiff has filed notice of appeal (Doc. 109).

II.

Defendants' motion for attorney's fees.

Defendants' motion for attorney's fees was timely filed and has been presented in the format described in LRCiv. 54.2, Local Rules of Practice for the District of Arizona. Defendants seek a fees award in the sum of $50,447.50 claiming success as to all of Plaintiff's six claims for relief.

The Court has reviewed Defendants' memorandum and supporting documents relevant to the motion for attorney's fees. Defense counsel has submitted an itemized statement of the fees incurred showing each task undertaken and the fee assessed for each identified task. (Doc. 110, Exhibit A to counsel's affidavit). Plaintiff has included with his response a chart that details his objections to many if not all of the tasks and fees set forth in defense counsel's itemized fee statement. (Doc. 112, Exhibit 4). Plaintiff objects to Defendants' itemized fee statement on several grounds, including that it is excessive and that the costs and fees applicable to each specific claim are not specifically identified as to that claim. Plaintiff also objects that Defendants and their counsel did not make a good faith attempt to

consult with him regarding the attorney's fees issue or to arrange a conference to consult with Plaintiff about an award of attorney's fees. Plaintiff also states that an award of attorney's fees would work an extreme hardship because he is without gainful employment and is suffering from certain medical impairments. Defendants respond that Plaintiff refused to engage in any discussions about their request for attorney's fees and that Plaintiff operates his own business and has not provided evidence of extreme hardship. Defendants further state that counsel's time on discovery issues was spent in large measure on responding to Plaintiff's often overbroad, unduly burdensome and non-relevant discovery requests.

At the outset, the Court notes that this case did not proceed to trial. The docket sheet shows that the parties engaged in some discovery, including exchanging documents and document production.

Defendants seek attorney's fees as to Plaintiff's civil rights claims under 42 U.S.C. § 1988(b). A prevailing defendant is entitled to attorney's fees under § 1988(b) only when the plaintiff's claims are "groundless, without foundation, frivolous, or unreasonable." McCarthy v. Mayo, 827 F.2d 1310, 1318 (9th Cir. 1987). This standard is "stringent." Hughes v. Rowe, 449 U.S.5,14(1980), and is interpreted narrowly in cases involving pro se plaintiffs. Miller v. Los Angeles Cty. Bd. of Ed., 827 F.2d 617, 619 (9th Cir. 1987). The Ninth Circuit has recognized that attorney's fees in civil rights cases "'should only be awarded to a defendant in exceptional circumstances."' Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999)(quoting Barry v. Fowler, 902 F.2d 770, 773 (9th Cir. 1990)). A case may be deemed frivolous

only when the "result is obvious or the ...arguments of error are wholly without merit." McConnell v. Critchlow, 661 F.2d 116, 118 (9th Cir. 1981). The Ninth Circuit has instructed courts to "consider the financial resources of the plaintiff in awarding fees to a prevailing defendant" because "the award should not subject the plaintiff to financial ruin." Miller, 827 F.2d at 621.

The facts relevant to Plaintiff's employment termination are set forth in the Court's Order on partial summary judgment. (Doc. 66). In granting Defendants' motion for summary judgment on Plaintiff's claim of constitutional violation asserted in Count IV, the Court determined that Plaintiff had no expectation of continued employment and thus no property interest in his position as City Manager. Plaintiff served at the will of the City Council and his employment was terminable without cause. The Court also determined that Plaintiff held a policymaking position. The Court further found that Plaintiff had been offered a name-clearing hearing and that he had not been denied a pre-termination and post-termination hearing in light of the terms of his Employment Agreement.

The Court concludes that while Plaintiff's federal claim could not withstand Defendants' motion for summary judgment, the claim was not frivolous or unreasonable. This case does not present "exceptional circumstances" so as to warrant an award of attorney's fees. Moreover, Congressional policies which underlie 42 U.S.C. § 1983 include "vigorous prosecution of civil rights violations" and fees should not be awarded which might unduly chill civil rights litigation. Miller, 827 F.2d at 619.

Next, Defendants seek attorney's fees on Plaintiff's claims arising from contract asserted in Counts I, II and V based on A.R.S. § 12-341.01A. Section 12-341.01A provides in relevant part that, "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Subsection B of § 12-341.01 provides that "[t]he award of reasonable attorney fees pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense."

The Court granted Defendants' summary judgment motion on Plaintiff's contract claims based on the conclusion that Plaintiff's Employment Agreement was subject to cancellation under the exception to the successor board doctrine as recognized by Arizona courts. Plaintiff in his position as City Manager and under the terms of his Employment Agreement was answerable to the City Council and therefore the newly elected City Council was entitled to select the City Manager. Plaintiff's Employment Agreement by its terms was subject to cancellation without cause by majority vote of the City Council and Defendants had fulfilled their obligation by paying Plaintiff a lump sum severance amount. Plaintiff's claim for tortious interference with contract did not withstand summary judgment because the claim requires that the contract must be one between the plaintiff and a third party.

Under Arizona law, an award of attorney's fees under § 12-341.01(A) is within the broad discretion of the trial court. State Farm Mutual Automobile Ins. Co. v. Arrington, 963 P.2d 334, 340 (Ariz. App. 1998). Defendants contend that attorney's fees should be awarded on Plaintiff's claims arising from

contract based on the conclusory assertion that Defendants prevailed on these claims on summary judgment. Plaintiff on the other hand has argued against an award of fees by discussing the factors applied in Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392 (9th Cir. 1996), that is, (1) whether the unsuccessful party's claim or defense was meritorious; (2) whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving this result; (3) whether assessing fees against the unsuccessful party would cause an extreme hardship; (4) whether the successful party prevailed with respect to all the relief sought; and (6) whether the award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees. Id., at 1405-06.

Defendants have not made a sufficient showing that an award of attorney's fees is warranted on Plaintiff's claims arising from contract. In addition, although Plaintiff has not proffered evidence of his financial condition, it can be assumed that an award of fees in the amount requested by Defendants would unduly burden any civil plaintiff. This fact, coupled with the possible discouraging effect of such an award on future civil litigants in contract cases, supports the denial of the request. Moreover, Defendants' itemized fee statement does not indicate which fee amounts were incurred on Plaintiff's claims arising from contract.

Finally, Defendants seek an award of attorney's fees as to Plaintiff's claims for violation of the AEPA (Count III) and Arizona's Open Meeting Law (Count VI). In their motion, Defendants cited A.R.S.

§ 12-349 which provides for an award of reasonable attorney's fees if a party brings a claim in a court of record in Arizona without substantial justification. Plaintiff argued in his response that in In re Larry's Apartment L.L.C., 249 F.3d 832, 837-39 (9th Cir. 2001), the Ninth Circuit rejected the right of a party to recover attorney's fees in federal court under § 12-349. Defendants in their reply then cited 28 U.S.C. § 1927. Section 1927 provides for recovery of costs, expenses and attorney's fees against an attorney or other person admitted to conduct cases in any federal court "who so multiplies the proceedings in any case unreasonably and vexatiously ..."

The Court denied Defendants' motion for summary judgment on Plaintiff's claim based on Arizona's Open Meeting Law. Defendants did not move for summary judgment on Plaintiff's AEPA claim. Plaintiff subsequently moved for voluntary dismissal of these claims so he could appeal the Order entered on summary judgment. These claims were dismissed without prejudice. Defendants are not entitled to an award of attorney's fees as to these claims based on § 1927.

Accordingly,

IT IS ORDERED that Defendants' motion for an award of attorney's fees (Doc. 108) is denied.